BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY V. REICHENBERGER	)	
Claimant	)	
VS.	)	
	)	Docket No. 217,814
PIPING DESIGN SERVICES	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
	)	

ORDER

Claimant appeals from a preliminary hearing Order of February 21, 1997, wherein Administrative Law Judge Jon L. Frobish denied benefits finding claimant had not suffered accidental injury arising out of and in the course of his employment.

ISSUES

Whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds that the above issue is one enumerated in K.S.A. 1996 Supp. 44-534a as appealable from a preliminary hearing order and as such said issue is proper before this Appeals Board.

Claimant, an employee of the respondent, was required to work at the Lear Jet plant facility. On September 16, 1996, he was injured while working between the parking lot and the Lear Jet building where he regularly worked. The fall occurred as claimant was crossing a ditch on his way to the building to clock in and begin his work shift. Claimant and respondent acknowledge that the parking lot was maintained and owned by Lear Jet and not by respondent. Claimant did testify that the accident occurred while on a direct route from the parking lot to the time clock, a route normally used by both Lear Jet employees and by employees of respondent who were assigned to work at the Lear Jet plant.

K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g) make it the claimant's burden of proof to show, by a preponderance of the credible evidence, his right to an award by proving all of the various conditions upon which his recovery depends. *See* also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Key to this decision is whether claimant was injured while in his employer's service or while going to or coming from claimant's employment. K.S.A. 1996 Supp. 44-508(f) states in part:

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

However, claimant argues that the parking lot, located on Lear Jet's premises, while not owned or maintained by respondent, should nevertheless be seen as a part of respondent's premises. Claimant agrees that although this parking lot is the only available route to or from work and is on a route not generally used by the public except in dealings with the employer, it did not involve a special risk or hazard.

Both parties cite and rely upon the holding in Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994). In Thompson the claimant, while exiting from

an elevator into a public hallway, fell and was injured. There were two offices off the hallway, one of which was the premises of the respondent employer of the claimant. Neither the claimant in Thompson, nor the claimant in this matter, argued that the employer's negligence was the proximate cause of the claimant's injury.

Thompson cites Larson's regarding the general "premises rules" with respect to parking lots:

> "As to parking lots owned by the employer, or maintained by the employer for his employees, practically all jurisdictions now consider them part of the 'premises,' whether within the main company premises or separated from it. This rule is by no means confined to parking lots owned, controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of the employer." 1 Larson's Workmen's Compensation Law § 15.42(a), pp.4-104 to 4-121; Thompson, *supra* at 42.

The Court in Thompson found it significant that there was no employer control to the right of ingress to and egress from the elevator onto the floor of the office building where claimant was injured. However, in this instance, respondent, through Lear Jet, had control over claimant's choice of parking lot. Claimant testified this was the closest parking lot to the building where he clocked in but it appeared claimant was at liberty to use any available parking space in any location.

The Supreme Court in Thompson also noted that it had repeatedly refused to adopt a "proximity" or "zone of employment" rule. Id. at 46. The Court has also rejected the employee claims where they merely allege substantial sufficient contact with the employer's premises at the time of the injury. In earlier decisions, the Court denied compensation for an injury occurring in an alley running through the employer's parking lot. *See* Murray v. Ludowici-Celadon Co., 181 Kan. 556, 313 P.2d 728 (1957). The Court also denied benefits when the injury occurred on the sidewalk in front of the employer's business. *See* Madison v. Key Work Clothes, 182 Kan. 186, 318 P.2d 991 (1957). Likewise, in Walker v. Tobin Construction Co., 193 Kan. 701, 396 P.2d 301 (1964), the employee was injured on a public street in front of the employer's premises and, again, the Court refused to award compensation. However, in Chapman v. Beech Aircraft Corp., 258 Kan. 653, 907 P.2d 828 (1995) benefits were awarded where the public street was found to constitute a special hazard.

The Court's rationale is that while "going and coming" to and from work the employee is only subject to the same risks or hazards as those to which the general public is subject. Those risks are not causally related to the employment. However, once the employee reaches the premises of the employer, the risk to which the employee is subjected has a causal connection to the employment and an injury sustained on the premises is

compensable even if the employee has not yet begun work. Thus, the "premises" rule is an exception to the "going and coming" rule. Thompson *supra* at 46.

In the instant case, however, the claimant was not on his employer's premises and the Appeals Board finds no special risk or hazard existed to overcome the limitations of K.S.A. 1996 Supp. 44-508(f).

The Appeals Board finds claimant was injured while on his way to assume the duties of his employment. Therefore, he did not suffer personal injury by accident arising out of and in the course of his employment and, as such, the Order of Administrative Law Judge Jon L. Frobish should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish of February 21, 1997, should be and hereby is affirmed, and claimant is denied benefits for the injury on September 16, 1996.

IT IS SO ORDERED.

Dated this _____ day of May 1997.

BOARD MEMBER

c: Kim R. Martens, Wichita, KS
Douglas D. Johnson, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director